Siew Yoke Keong v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–135 OF 2011(B)
RAUS SHARIF PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF, ABDULL HAMID EMBONG AND AHMAD MAAROP FCJJ
13 MARCH 2013

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Retrial — Trafficking in 1,583.4g of dangerous drugs — Accused convicted and sentenced to death — Whether there was misdirection by courts below — Whether prosecution proved exclusive possession of proscribed drugs — Whether adverse inference under s 114(g) of the Evidence Act 1950 invoked for non-calling of witness — Whether Court of Appeal accurate in relying on the information received — Whether prima facie case proven by prosecution — Dangerous Drugs Act 1952 s 39B(1)(a)

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Evidence — Adverse inference — Evidence Act 1950 s 114(g) — Failure to call material witness — Accused's wife who arrested with him not called — Whether there was suppression or withholding of evidence

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Evidence — Information leading to facts discovered — Evidence Act 1950 s 27 — Accused led police to premises where drugs were kept — Doors and grilles locked — Accused pointed to police to show location of keys — Keys location concealed and not easily discovered — Keys opened doors and grilles where drugs were discovered — Whether accused's act of pointing constituted information — Whether information admissible under s 27 of the Evidence Act 1950

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Pursuant to the decision of the Court of Appeal ordering that the conviction and sentence of the appellant ('Siew') be set aside and that he be retried before another judge, Siew was retried in the High Court on the charge of trafficking in 1,583.4g of dangerous drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Siew was arrested in an ambush by PW6 and a police party who acted upon information received. Upon interrogation, Siew led the police party to a house ('the first house'). The padlocks of the front gate and the house grille, were unlocked by PW6 using one of the keys retrieved from a black sling bag that Siew was wearing when he was arrested. As they entered the house, PW6 proceeded to a room and found it to be locked. When asked about the key, Siew pointed to where it was and according to PW6, the location of the bunch of keys was such that one could not see it. PW6 managed to open the

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door to the room and found a safe which was locked with a combination lock and a key. Again, Siew pointed that the key was at the crook of one of the legs of the dining table in the living room and PW6 succeeded in opening the safe. Inside the safe, substances suspected to be heroin, inter alia, were found. PW6 then proceeded to the third room and using one of the keys found earlier, PW6 opened the door and items believed to be dangerous drugs were retrieved. Siew then led the police party to another house ('the second house'). A search in the house found white powder suspected to be caffeine; a box of glass bottles filled with liquid suspected to be chloroform; and a box of glass bottles filled with liquid suspected to be hydrochloric acid. Siew and his wife ('Chantana') were arrested. A chemist report later revealed that the items seized were indeed dangerous drugs. The owners of the first house, PW3 and PW4 testified that the house was rented to Siew and that he held house keys. At the close of the prosecution's case, the High Court found that the prosecution had made out a prima facie case against Siew. In his defence, Siew admitted to renting the first house, but claimed that he had never stayed there as he was staying in the second house. The first house, he alleged, was for his friend ('Wah Chai') and Siew denied knowledge of the proscribed drugs, contending that they belonged to Wah Chai. Satisfied that the prosecution had proved its case against Siew beyond reasonable doubt, the High Court convicted and sentenced him to death. An appeal to the Court of Appeal was dismissed, and his conviction and sentence were affirmed. Hence, the present appeal. The issues that arose for adjudication were whether there was misdirection by the High Court and the Court of Appeal in admitting the act of pointing by Siew as information under s 27 of the Evidence Act 1950 ('the Act'); whether the prosecution proved exclusive possession of the proscribed drugs; whether the courts below had invoked the adverse inference under s 114(g) of the Act for the non-calling of Chantana; whether the Court of Appeal was accurate in relying on the information received in connection with the case; whether the evidence adduced by the prosecution proved a prima facie case against Siew; and whether Siew had an obligation to disclose his defence during the prosecution's case.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Information admissible under s 27 of the Act included an accused's statement, or his act or conduct such as pointing out which led distinctly to the discovery of a fact. For such information to be admissible, there was no duty on the prosecution to prove voluntariness of the information. Although there was no evidence to show that Siew had given any statement to PW6 when asked where the key was, Siew pointed to the bunch of keys at a location that one would not be able to see it if one was entering the bathroom. In other words, if Siew had not pointed it to PW6, the latter would not be able to retrieve the keys. Siew's act of pointing amounted to information, and that information related

distinctly to the discovery of a fact and was admissible under s 27 of the Act. The fact discovered embraced the place where the bunch of eight keys was kept and Siew's knowledge as to that. The evidence of Siew leading PW6 and the police team to the first house and pointing to the place where the keys were found, and later pointing out the place where the key to the safe was found would also be relevant and admissible as conduct under s 8 of the Act (see para 28).

(2) Each of the circumstantial evidence, taken by itself, was insufficient to bring home the charge against Siew. However, it was the combined effect of the several strands of circumstantial evidence which must be considered by the court. Siew was so situated to the proscribed drugs found in the rooms in the first house that he had the power to deal with it as owner to the exclusion of all other persons, and when the circumstances were such that he may be presumed to intend to do so in case of need. Furthermore, as a tenant, Siew was in possession of the keys to the first house which he carried with him in his sling bag. PW6 managed to unlock the gate and the grille using one of the keys found in Siew's possession and there was nobody in the house. The room was locked and a bunch of keys was pointed to PW6 by Siew. The keys were concealed from view, but Siew knew where it was hidden. Siew also knew where the safe key was hidden (see paras 36–37).

(3) There was nothing in the judgment of the learned trial judge to show that she had acted on the impugned information in arriving at her decision to find Siew guilty of the trafficking charge. Similarly, there was nothing in the judgment of the Court of Appeal to show that it had acted on the impugned information in upholding the decision of the High Court (see para 39).

(4) Adverse inference under s 114(g) of the Act could only be drawn if there occasioned withholding or suppression of evidence and not merely on account of failure to obtain evidence. However, no such withholding or suppression of evidence occurred in the present appeal. In fact in the retrial, the prosecution had sought to introduce, under s 33 of the Act, Chantanas' evidence given in the earlier trial but was rejected by the learned trial judge because she held that the prosecution's efforts fell short of the pre-conditions under s 33 of the Act. However, she was satisfied that the prosecution did make an effort to bring her to Court, but failed to do so (see para 41).

(5) Although failure on the part of the defence to put its case to the material prosecution's witness could never, by itself, relieve the prosecution of its duty to prove the charge against the accused beyond reasonable doubt, such failure by the defence did have serious implication on the accused's credibility and the weight to be attached to his evidence. The necessity of

putting the essence of his case to the material prosecution's witness was not a mere technical rule of evidence but was a rule of essential justice (see para 46).

[Bahasa Malaysia summary

Menurut keputusan Mahkamah Rayuan yang memerintahkan agar sabitan dan hukuman perayu ('Siew') diketepikan dan agar dia dibicarakan semula di hadapan hakim lain, Siew telah dibicarakan di Mahkamah Tinggi atas pertuduhan mengedar 1,583.4g dadah berbahaya, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Siew telah ditangkap dalam serbuan oleh PW6 dan pasukan polis yang bertindak atas maklumat yang diterima. Selepas disoal siasat, Siew telah membawa pasukan polis ke sebuah rumah ('rumah pertama'). Ibu kunci-kunci pagar depan dan gril rumah, telah dibuka oleh PW6 menggunakan salah satu daripada kunci yang ditemui dalam beg sandang hitam yang terdapat pada Siew semasa dia ditangkap. Semasa mereka memasuki rumah itu, PW6 terus ke sebuah bilik dan mendapati ia dikunci. Apabila diminta kuncinya, Siew menunjuk di mana ia berada dan menurut PW6, tempat letak segugus kunci itu tidak mudah kelihatan. PW6 berjaya membuka pintu bilik itu dan mendapati peti yang dikunci dengan gabungan nombor dan kunci. Sekali lagi, Siew menunjuk ke arah kunci yang terletak dilengkung salah satu daripada kaki meja makan di bilik istirehat dan PW6 telah berjaya membuka peti itu. Dalam peti itu, bahan yang disyaki heroin, antara lain, telah ditemui. PW6 kemudian terus ke bilik ketiga dan menggunakan salah satu daripada kunci yang ditemui sebelum itu, PW6 membuka pintu dan barangan yang dipercayai dadah berbahaya telah ditemui. Siew kemudian membawa pasukan polis ke rumah lain ('rumah kedua'). Carian dalam rumah telah menjumpai serbuk putih disyaki adalah kafein; satu kotak botol kaca dipenuhi cecair yang disyaki adalah klorofom; dan satu kotak botol kaca dipenuhi dengan cecair yang disyaki adalah asid hidroklorik. Siew dan isterinya ('Chantana') telah ditangkap. Laporan ahli kimia kemudian mendedahkan bahawa barangan yang dirampas sememangnya adalah dadah berbahaya. Pemilik-pemilik rumah pertama, PW3 dan PW4 memberi keterangan bahawa rumah itu telah disewa kepada Siew dan bahawa dia yang memegang kunci-kunci rumah itu. Di penutup kes pendakwaan, Mahkamah Tinggi mendapati bahawa pendakwaan telah membuktikan kes prima facie terhadap Siew. Dalam pembelaannya, Siew mengaku telah menyewa rumah pertama itu tetapi mendakwa bahawa dia tidak pernah tinggal di situ kerana dia tinggal di rumah kedua. Di rumah pertama, dia mengatakan adalah untuk kawannya ('Wah Chai') dan Siew menafikan mempunyai pengetahuan tentang dadah berbahaya itu, dengan berhujah bahawa ia adalah milik Wah Chai. Berasa puas hati bahawa pendakwaan telah membuktikan kesnya terhadap Siew melampaui keraguan munasabah, Mahkamah Tinggi teah mensabit dan menjatuhkan hukuman mati ke atasnya. Rayuan kepada Mahkamah Rayuan telah ditolak, dan sabitan dan hukumannya disahkan. Justeru rayuan ini. Isu-isu yang timbul untuk diadili adalah sama ada terdapat salah arah oleh

Mahkamah Tinggi dan Mahkamah Rayuan dalam menerima perbuatan menunjuk Siew itu sebagai maklumat di bawah s 27 Akta Keterangan 1950 ('Akta tersebut'); sama ada pendakwaan telah membuktikan milikan eksklusif ke atas dadah berbahaya itu; sama ada mahkamah-mahkamah bawahan telah menggunakan inferens bertentangan di bawah s 114(g) Akta tersebut kerana tidak memanggil Chantana; sama ada Mahkamah Rayuan adalah tepat kerana bergantung kepada maklumat yang diterima berkaitan kes itu; sama ada keterangan yang dikemukakan oleh pendakawaan membuktikan kes prima facie terhadap Siew; dan sama ada Siew mempunyai tanggungjawab untuk mendedahkan pembelaannya semasa kes pendakwaan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Maklumat yang boleh diterima di bawah s 27 Akta tersebut termasuklah kenyataan tertuduh, atau tindakan atau perbuatannya seperti menunjuk, membawa kepada penemuan suatu fakta. Untuk maklumat sebegitu boleh diterima, tiada kewajipan ke atas pendakwaan untuk membuktikan kerelaan maklumat itu. Walaupun tiada keterangan untuk menunjukkan bahawa Siew telah memberikan apa-apa kenyataan kepada PW6 apabila ditanya mana kunci itu, Siew telah menunjuk kepada segugus kunci di lokasi yang tidak mudah dilihat jika seseorang itu memasuki bilik air. Dalam perkataaan lain, jika Siew tidak menunjukkannya kepada PW6, PW6 tidak mungkin dapat menemui kunci-kunci tersebut. Tindakan menunjuk Siew itu membentuk suatu maklumat, dan maklumat tersebut berkaitan kepada penemuan fakta dan boleh diterima di bawah s 27 Akta tersebut. Fakta yang ditemui itu menunjukkan tempat di mana gugusan lapan kunci disimpan dan pengetahuan Siew berhubung perkara itu. Keterangan Siew yang membawa PW6 dan pasukan polis ke rumah pertama dan menunjukkan tempat di mana kunci-kunci tersebut dijumpai, dan kemudian menunjukkan tempat di mana kunci kepada peti dijumpai juga adalah relevan dan boleh diterima sebagai perbuatan di bawah s 8 Akta tersebut (lihat perenggan 28).

(2) Setiap keterangan menurut keadaan, diambil dengan sendirinya, adalah mencukupi untuk membentuk pertuduhan terhadap Siew. Walau bagaimanapun, ia adalah gabungan kesan beberapa butir keterangan mengikut keadaan yang perlu dipertimbangkan oleh mahkamah. Siew amat yakin dengan dadah berbahaya yang ditemui dalam bilik-bilik di rumah pertama bahawa dia mempunyai kuasa untuk berurusan dengannya sebagai pemilik terhadap pengecualian semua orang lain, dan apabila keadaan sebegitu sehingga dia boleh dianggap telah berniat untuk berbuat demikian jika perlu. Tambahan pula, sebagai penyewa, Siew memiliki kunci-kunci kepada rumah pertama yang dibawa bersamanya dalam beg sandangnya. PW6 berjaya membuka kunci pagar dan gril menggunakan salah satu daripada kunci-kunci yang ditemui dalam

A milikan Siew dan tiada orang lain dalam rumah itu. Bilik itu dikunci dan segugus kunci telah ditunjukkan kepada PW6 oleh Siew. Kunci-kunci itu terhadang daripada pandangan, tetapi Siew mengetahui di mana ia disembunyikan. Siew juga mengetahui di mana kunci peti itu disembunyikan (lihat perenggan 36–37).

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(3) Tiada apa-apa dalam penghakiman hakim perbicaraan yang bijaksana untuk menunjukkan bahawa beliau telah bertindak atas maklumat yang dipersoalkan ketika tiba kepada keputusannya yang mendapati Siew adalah bersalan kerana pertuduhan pengedaran. Begitu juga, tiada apa-apa dalam penghakiman Mahkamah Rayuan yang menunjukkan bahawa ia telah bertindak atas maklumat yang dipersoalkan dalam mengekalkan keputusan Mahkamah Tinggi (lihat perenggan 39).

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(4) Inferens bertentangan di bawah s 114(g) Akta tersebut hanya boleh dibuat jika terdapat sebarang penahanan atau penindasan keterangan dan bukan semata-mata atas kegagalan memperoleh keterangan. Walau bagaimanapun, tiada penahanan atau penindasan keterangan berlaku dalam rayuan ini. Bahkan dalam perbicaraan semula, pendakwaan memohon untuk memperkenalkan, di bawah s 33 Akta tersebut, keterangan Chantana yang telah diberikan dalam perbicaraan terdahulu tetapi telah ditolak oleh hakim perbicaraan yang bijaksana kerana beliau memutuskan bahawa usaha pendakwaan tidak memenuhi prasyarat di bawah s 33 Akta tersebut. Walau bagaimanapun, beliau berpuas hati bahawa pendakwaan telah berusaha untuk membawanya ke mahkamah, tetapi gagal berbuat demikian (lihat perenggan 41).

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(5) Walaupun berlaku kegagalan di pihak pembelaan untuk mengemukakan kesnya kepada saksi utama pendakwaan ini tidak dengan sendirinya melepaskan pendakwaan daripada kewajipannya untuk membuktikan pertuduhan terhadap tertuduh melampaui keraguan munasabah, kegagalan sedemikian oleh pihak pembelaan mempunyai kesan serius ke atas kebolehpercayaan tertuduh dan beban yang terletak ke atas keterangannya. Keperluan mengemukakan inti pati kesnya kepada saksi utama pendakwaan bukan semata-mata rukun keterangan yang teknikal tetapi adalah rukun penting keadilan (lihat perenggan 46).]

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Notes

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For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

For cases on Evidence Act 1950, s 114(g), see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 166–168.

For cases on Evidence Act s 27, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2097–2099.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)
Adel Muhamed El Dabah v Attoney General of Palestine [1944] AC 168, PC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (distd)
Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367; [2009] 3 CLJ 109, FC (refd)
Amathevelli a/p Ramasamy v PP [2008] 3 MLJ 782; [2008] 4 CLJ 413, CA (refd)
Balakrisnan a/l Purushotaman lwn Pendakwa Raya [2012] 2 MLJ 478, CA (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Chan King Yu v PP [2009] 1 MLJ 457, FC (distd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Chong Soon Koy v PP [1977] 2 MLJ 78, FC (refd)
Durlav Namasudra v Emperor AIR 1932 Cal 297; [1932] 26 CWN 373; [1932] 37 Cr LJ 546, HC (refd)
Francis Anthonysamy v PP [2005] 3 MLJ 389, FC (refd)
Gurusamy v PP [1965] 1 MLJ 245 (refd)
Karam Din v Emperor AIR 1929 Lahore 338 (refd)
Khoon Chye Hin v PP [1961] MLJ 105, CA (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Mohd Shamshir bin Md Rashid v PP [2008] 5 MLJ 80; [2008] 5 AMR 29, CA (refd)
Mohd Ya'cob bin Demyati lwn Pendakwa Raya [2011] 2 MLJ 321; [2011] 4 CLJ 758, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Prakash Chand v State AIR 1979 SC 400, SC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Chin Moi Moi [1995] 1 SLR 297, HC
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC
PPr v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
PP v Hashim bin Hanafi [2002] 4 MLJ 176, HC (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1; [2007] 6 CLJ 341, FC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
Ramakrishnan v Bombay State AIR 1955 SC 104; [1955] Cr LJ 196, SC (refd)
Teoh Hoe Chye v PP Yeap Teong Tean v PP [1987] 1 MLJ 220, SC (refd)
Udayar Alagan & Ors v PP [1962] 1 MLJ 39, CA (refd)
Wai Chan Leong v PP [1989] 3 MLJ 356, SC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), (da)(i), (da)(iiia), 37A, 39B(1)(a), 39B(2)

A Evidence Act 1950 ss 8, 27, 33, 60(b), 91, 92, 114(g), 157
Internal Security Act 1960 ss 57(1)(a), (b)

Appeal from: Criminal Appeal No B-05–79 of 2008 (Court of Appeal, Putrajaya)

B *Gurubachan Singh (Bachan & Kartar) for the appellant.*
Mangaiarkarasi a/p Krishnan (Devinderjit Kaur Gill with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

C **Ahmad Maarop FCJ (delivering judgment of the court):**

BACKGROUND

D **[1]** The appellant — Siew Yoke Keong ('Siew') was retried in the High Court on the charge of trafficking in 1,583.4g of dangerous drugs (1,452.1g of heroin and 131.3g of monoacetylmorphines) on 13 August 1997, at about 1.50am at house No 3, Lot 6862-A, Lorong 3D, Kampung Baru Subang, in the District
E of Petaling, in the State of Selangor, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA. The retrial was pursuant to the decision of the Court of Appeal on 4 January 2005 ordering that the conviction and sentence on Siew be set aside and that he be retried before another judge. At the conclusion of the retrial the
F High Court found Siew guilty, convicted him and sentenced him to death. His appeal to the Court of Appeal was dismissed and the conviction and sentence on him was affirmed. Siew preferred an appeal to this court.

THE PROSECUTION'S CASE

G **[2]** The evidence adduced by the prosecution is as follows. Acting on information received on 13 August 1997 at about 12.30am, DSP Yap Seng Hock ('PW6') and a team of police personnel which included Sgt Major Mohd Kasim bin Awang Noh ('PW5') waited in ambush in the vicinity of house No
H 7 Jalan 3, Taman Subang. At about 1.10am on the same date, a car arrived in front of the house. The driver was the only person in the car. The car did not stop. It proceeded to the end of the road, and about 2–3 minutes later, it turned back and stopped in front of the house. The driver — who was Siew, got out of the car. PW6 and his team pounced on Siew, identified himself as a police
I officer and arrested Siew. At that time Siew was holding a black sling bag. In that bag, PW6 found a wallet, Siew's identity card and a bunch of three keys. Siew was whisked away and taken to Balai Polis Kg Baru Subang.

[3] At the police station, PW6 administered the caution under s 37A of the

DDA to Siew. PW6 then questioned Siew. Upon conclusion of the questioning, Siew led PW6 and his team to a single storey semi-detached house at No 3, Lot 6862-A, Lorong 3-D, Kg Baru Subang (the first house). On arrival at the first house, PW6 found the front gate to be locked with a 'Solex' padlock. Using one of the keys found in the black sling bag seized from Siew earlier, PW6, managed to unlock the padlock. PW6 and his team took Siew into the compound of the first house. PW6 saw that the grille door to the house was also locked with another 'Solex' padlock. Using the same key which was used to unlock the gate padlock, PW6 managed to unlock the grille door padlock. PW6 found the sliding front door to be closed but not locked. PW6 slid open the door and entered the house. The lights in the living room were on. PW6 began his search of the house. PW6 went to the first room on the left. It was not locked. He switched on the lights and found that there was no furniture in the room except for a big mattress.

[4] PW6 then went to the second room. He found it locked. According to PW6, he asked Siew where the room key was. PW6 said he found a bunch of eight keys on the long fluorescent lamp which was fixed above the door to the bathroom. That bunch of keys was pointed to him by Siew. Learned counsel representing Siew in the High Court objected to that evidence on the ground that it was not evidence which led to discovery as Siew had been arrested by then and the act of pointing amounted to a statement. Learned counsel contended that a trial within a trial should have been conducted. More of this later when we deal with learned counsel's submission on this issue. Now, reverting to PW6's evidence, the location of the bunch of keys on the fluorescent lamp was such that one could not see it when entering the bathroom. The bathroom was in darkness. PW6 switched on the lamp. Then with his hands, PW6 groped for the keys on top of the lamp. Using one of the keys from the bunch of keys which he had retrieved, PW6 managed to open the door to the second room. PW6 switched on the lights in the room. He saw a safe (brand 'Leeco') in the room — to the left of the door. The safe was locked with a combination lock and a key.

[5] PW6 managed to find the key to the safe. It was found at the crook of one of the legs of the dining table which was in the living room. The key was pointed to him by Siew. That evidence was also objected to by learned counsel representing Siew on similar grounds of objection in respect of Siew's act of pointing which led to finding by PW6 of the bunch of keys on top of the lamp which was fixed on the door to the bathroom. According to PW6, unless shown the key, one would not be able to see the key at the place where it was hidden. Using the key found at the crook of one of the legs of the table, PW6 succeeded in opening the safe. According to PW6, because the combination lock had by then already been unlocked, he was able to open the safe using the key. In the

safe PW6 found four blocks of substance suspected to be heroin. Apart from that PW6 also found three handguns and 52 rounds of ammunition in the safe.

[6] PW6 then proceeded to the third room. He found it to be locked. Using one of the keys in the bunch of eight keys found earlier PW6 opened the door to the third room and switched on the lights. In the third room PW6 found a great number of items (as listed in the search list (P70) including the following:

(a) nine plastic packets in a New-Sun bag containing substance suspected to be heroin;

(b) a box containing 12 plastic packets all of which contained substance suspected to be heroin;

(c) an aluminium bowl containing a white powder which PW6 suspected to contain caffeine;

(d) a green plastic container containing white powder;

(e) a sack containing white powder suspected to be caffeine;

(f) a box with the brand name 'Hamburg Chemicals', containing three glass bottles filled with chloroform;

(g) a box with the brand name 'Rusy', containing three glass bottles filled with hydrochloric acid;

(h) four microwave ovens;

(i) two food processors;

(j) weighing scales;

(k) a sealing machine;

(l) 12 packets containing a total of 144 pink plastic bottles containing colouring matter; and

(m) two packets containing a total of 24 red plastic bottles containing colouring matter.

[7] From the first house, PW6 and his team together with Siew went to a double storey house at No 74, Jalan SP2/10, Subang Perdana, Shah Alam (the second house). At the second house, PW6 met Siew's wife — Chantana d/o Sanan who opened the door for them. PW6 searched the house. In a store room on the ground floor of the house PW6 found the following:

(a) eight sacks containing a white powder suspected to be caffeine;

(b) a box containing four glass bottles filled with a liquid suspected to be chloroform; and

(c) a box containing two glass bottles filled with a liquid suspected to be hydrochloric acid.

[8] Siew and Chantana were arrested.

[9] The chemist, Mr Chong Yong Kiong ('PW7') confirmed that:

(a) the four blocks found in the safe in the second room in the first house contained 924.6g of heroin;

(b) the substance found in aluminium bowl in the third room in the first house contained 242g of heroin;

(c) the substance in the nine plastic packets found in the third room in the first house contained 111.6g of heroin and 52.3g of monoacetylmorphine; and

(d) the substance in the 12 plastic packets found in the third room of the first house contained 173.9g of heroin and 79.0g of monoacetylmorphine.

[10] The evidence of the owner of the first house, Koh Chin ('PW3') and her husband, Koh Sam Choy ('PW4') established that the house was rented to Siew on 10 April 1997 with the monthly rental of RM70. The tenancy agreement regarding the same was identified as P68. The house key was given to Siew.

[11] At the close of the prosecution, the High Court found that the prosecution had made out a prima facie case of trafficking against Siew and called upon him to enter on his defence.

[12] Siew elected to and gave a statement from the dock. A written statement was tendered as Siew's statement and was marked as D171. Siew admitted that he rented the first house, but claimed that it was for his friend Wah Chai. Siew said he had never stayed in the house. Siew and his wife stayed in the second house. He denied knowledge of the proscribed drugs and said all the things in the first house belonged to Wah Chai. However, Siew admitted that he knew the combination number of the safe. The statement reads as follows:

> I was arrested by police on 13/8/1997 at about 1.15 a.m. when I stopped a car that I was driving. I was arrested at Taman Subang. When I was arrested a bunch of keys were recovered by the police from a bag that I was carrying. After arrest I was brought to the Balai Polis Kampung Baru Subang. I was asked to show the house in respect of which the key was recovered by the police. I did so. The house is at No. 3, Lot 6862-A, Lorong 3-D, Kampung Baru Subang. This house was in fact rented by my friend from Singapore by the name of Ah Wah or Wah Chai. His full name was Ong Wah Chai. He asked me to find a house for rent as he wanted to do some medicine business. I agreed and I rented the house. Ah Wah paid the deposit and rental. He told me to rent under my name because he said that if he rents under his

A name, the rental would be high as he is a Singaporean. I had known Ah Wah for 5–6 years before arrest and he was my good friend. He had helped me get jobs with good pay.

I was then working as a welder earning about RM2,000.00 per month. I was married to a lady from Thailand by the name of Chantana a/p Sanan and had one B child. I and my wife stayed at No. 74, SB 2110, Taman Subang Perdana, Kampung Baru Subang.

Ah Wah employed 4–5 workers who use to work in the house. I do not know what work they did. I seldom went to the house. Ah Wah used to come quite often and stay in the house. He also showed me a safe (Peti Besi) with a combination lock C number where he kept his personal things. I and my wife had a set of keys to the house but seldom went there. We only went there when Ah Wah was there and we also saw his workers working in the house. When the police asked me to show the house, I cooperated with the police and also held open the safe because I knew the combination number. I did not know or suspect that there were drugs in the house. The drugs did not belong to me. All the items in the house belong to Ah Wah. D Although the tenancy agreement was on my name, I was not the actual tenant and I never once stayed in the house.

Ah Wah use to stay in the house. The workers would go back to their houses after work.

E When the police told me that what they found in the house was drugs, I was shocked. That was the first time I knew that there were drugs in the house.

I did not possess or traffic in the drugs. In fact I had no knowledge of the existence of the drugs in the house. After my arrest I gave a statement to the police where I told the police about Ah Wah or Wah Chai.

F I do not know where my wife is now otherwise she can confirm the facts as stated above.

I wish to say that I am innocent and have done no wrong. The culprit is Ah Wah also known as Wah Chai.

G

[13] At the end of the case, the High Court was satisfied that the prosecution had proved its case against Siew beyond reasonable doubt. Siew was convicted and sentenced to death.

H SUBMISSIONS

[14] In his submission before this court, learned counsel for Siew raised a number of grounds which could be grouped under the following headings:

I (a) misdirection on the part of the High Court and the Court of Appeal in admitting the act of pointing by Siew as information under s 27 of the Evidence Act 1950;

(b) failure by the prosecution to prove exclusive possession of the proscribed drugs;

(c) failure by the courts below to invoke the adverse inference under s 114(g) of the Evidence Act 1950;

(d) error on the part of the Court of Appeal in relying on the information received in connection with the case;

(e) the evidence adduced by the prosecution fell short of proving a prima facie case against Siew; and

(f) no obligation on Siew to disclose his defence during the prosecution's case.

[15] We will deal with these grounds in turn although not necessarily in the order that the grounds were argued by learned counsel.

MISDIRECTION IN ADMITTING THE ACT OF POINTING AS INFORMATION UNDER S 27 OF THE EVIDENCE ACT.

[16] This is actually the principal ground relied upon by learned counsel in his argument attacking the conviction and sentence passed against Siew.

[17] Learned counsel submitted that there was a serious misdirection on the part of the High Court and the Court of Appeal in admitting and relying on the evidence in respect of the recovery of the proscribed drugs. In this regard, according to the learned counsel, in the course of the trial in the High Court, the prosecution attempted to introduce through PW6, the evidence that the key to the safe was found at the crook of one of the legs of the dining table in the living room after Siew showed it to him. The learned counsel said that evidence was objected to on the ground that since the Siew had been arrested and Siew's act of pointing amounted to a statement, a trial within trial ought to have been held. In fact objection on similar ground was made by learned counsel earlier on, to PW6's evidence that he found a bunch of eight keys on the long fluorescent lamp which was fixed on the door of the bathroom, after Siew showed it to him. According to the learned counsel, at the close of the prosecution's case the learned trial judge ruled the evidence objected to as being admissible under s 27 of the Evidence Act. That finding of the High Court was upheld by the Court of Appeal which held that 'information' under s 27 of the Evidence Act included not only 'statement' but conduct as well (in this case, the act of pointing). Learned counsel contended that the decision of the Court of Appeal was erroneous and contrary to the decision of the Federal Court in *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 3 CLJ 109.

[18] From the evidence adduced, Siew's act of pointing occurred on two

A occasions. The first is in respect of the discovery the bunch of eight keys on the fluorescent lamp which was fixed above the door to the bathroom. PW6's evidence is as follows:

> Kemudian saya buat pemeriksaan di bilik kedua, iaitu bilik tengah.
>
> B Saya mahu buka pintu itu, bilik berkunci.
>
> Saya tanya suspek mana kunci bilik itu.
>
> Saya dapat buka pintu bilik itu.
>
> C Buka dengan salah satu kunci dalam serangkai yang ada 8 anak kunci.
>
> Kunci ini saya jumpai di atas bingkai pintu bilik air, di atas lampu panjang yang ada di atas pintu masuk ke bilik air.
>
> *Kunci ditunjukkan oleh suspek*
>
> D Kemudian saya cuba salah satu kunci itu dan dapat buka pintu kedua atau pintu tengah.

[19] The second occasion is in respect of the discovery of the key to the safe in the second room. PW6's evidence is as follows:

E

> Selepas saya buka pintu tengah, bilik gelap.
>
> Saya nyalakan lampu. Lepas itu saya nampak di sebelah kiri pintu bilik itu ada sebuah peti besi (safe) berjenama Leeco.
>
> F Saya dapati peti besi itu adalah jenis kombinasi dan juga perlu buka dengan kunci.
>
> Kunci peti besi selepas itu dapat dijumpai.
>
> Dijumpai di bawah celah kaki besi meja makan di ruang tamu.
>
> *Kunci itu ditunjukkan oleh saspek.*
>
> G
>
> Kalau kita di ruang tamu, kunci tak boleh nampak kecuali ditunjukkan. Saya dapat buka peti besi itu dengan kunci.

[20] Learned counsel argued that in the present case there was no oral H evidence or document before the court to establish what was the information allegedly given by Siew to PW6. Learned counsel contended that the act of pointing did not amount to information under s 27 of the Evidence Act. He submitted that the Court of Appeal misdirected itself when it relied on a decision of the Singapore Court (*Public Prosecutor v Chin Moi Moi* [1995] 1 I SLR 297) instead of the decision of the Federal Court in *Amathevelli* which was decided before *Public Prosecutor v Chin Moi Moi*. For reasons which we will give in a moment, we are unable to agree with the submission of learned counsel as aforesaid. The submission raised the issue of whether Siew's act of pointing amounted to information under s 27 of the Evidence Act.

[21] Section 27 of the Evidence Act 1950 provides: A

> When any fact is deposed to as discovered in consequence of *information* received from a person accused of any offence in the custody of a police officer, so much of that *information*, whether the *information* amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. B

[22] It is very important to note that s 27 of the Evidence Act uses 'information' instead of 'statement'. Information cannot be used as synonymous with statement. Information connotes two things — (a) a statement or other means employed for imparting knowledge possessed by one person to another, and (b) the knowledge so derived by the other person. Explaining this in *Karam Din v Emperor* AIR 1929 Lahore 338 Dalip Singh J said: C

> *In connexion with this it is necessary to bear in mind that the word 'information' cannot be used as synonymous with the word 'statement'. There is no reason why the word 'information' should have been used instead of the word 'statement' in the section if by 'information' statement alone was intended. The word 'information' as distinct from the word 'statement' connotes two things, namely a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person.* It is unnecessary to enter into the question whether all means of imparting knowledge by one person to another person are or are not covered by the word 'statement' but it is necessary to emphasise the second portion, namely, that *'information' also includes the knowledge derived by the person informed from the informant.* To me, therefore, it seems clear that when a person deposes simply to the following effect, namely, that from information received from the accused he proceeded to do certain things and discovered certain other things, this statement is by itself relevant and admissible in evidence against the accused. In order to make it irrelevant or inadmissible against the accused, it would not be sufficient merely to put a question to the deponent which tended to show that the information was derived from an oral statement made by the accused, for the fact that there was such an oral statement would not make the statement inadmissible for the reason that *the word 'information' includes, as already stated, the knowledge derived by the person as well as the means taken to impart that knowledge.* (Emphasis added.) D E F G

[23] In the same case, Harrison J said: H

> The test for admissibility under this section is in my opinion that the information has borne fruit in discovery and that it is clear that the discovery was the result of the receipt of the information. *It is immaterial what may have been the nature of the channel of communication. It is immaterial whether the words spoken or written or the signs or the visible representations, which related distinctly to the fact thereby discovered, constituted the whole or only part of the speech, writing, picture etc.* (Emphasis added.) I

[24] *Karam Din v Emperor* was followed in *Public Prosecutor v Hashim Hanafi* [2002] 4 MLJ 176 where Augustine Paul J (later FCJ) said:

A

It is therefore clear beyond doubt that the information given by an accused under s 27 need not be in the actual words used though a written record is desirable. This is justified on the ground that s 27 uses the word 'information' and not the word 'statement' which is used in ss 17–31 of the Act (see *Bhagirath v State of MP* AIR 1959 MP 17). In *Yee Ya Mang v Public Prosecutor* reference was made at p 122 to *Karam Din v Emperor* AIR 1929 Lah 338 where Dalip Singh J in considering the scope of the word 'information' in s 27 said at p 340:

B

In connection with this it is necessary to bear in mind that the word 'information' cannot be used as synonymous with the word 'statement'. There is no reason why the word 'information' should have been used instead of the word 'statement' in the section if by 'information', statement was intended. The word 'information' as distinct from the word 'statement' connotes two things, namely a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person.

C

As 'information' includes knowledge derived by a person, it can be given in testimony in any form so long as it is within the ambit of the knowledge so derived.

D

[25] That passage in *Public Prosecutor v Hashim Hanafi* was quoted with approval by the Court of Appeal in *Balakrisnan a/l Purushotaman lwn Pendakwa Raya* [2012] 2 MLJ 478 (which decision was affirmed by the Federal Court in *Rayuan Jenayah No 05–04–2011(K)*).

E

[26] In fact, earlier, in *Wai Chan Leong v Public Prosecutor* [1989] 3 MLJ 356, the Supreme Court had already decided that 'information' which was deliberately used by the legislature under s 27 of the Evidence Act, (unlike statement), included knowledge derived by the person informed by the accused as well as the means used to impart that knowledge. This is clear from the judgment of Gunn Chit Tuan SCJ delivering the judgment of the court:

F

G

It must be observed that the legislature has used the expression 'information' in s 27 of the Evidence Act and therefore did not intend it to have the same meaning as a statement. Although the expression is not defined in the Evidence Act, *unlike a statement, it includes knowledge derived by the person informed by the accused as well as the means taken to impart that knowledge.* (Emphasis added.)

H

[27] The decision in *Wai Chan Leong v Public Prosecutor* was followed by the Singapore Court in *Public Prosecutor v Chin Moi Moi* where Yong Pung How CJ said at p 305:

I

It is material to note that 'information' under s 27 does not only apply to statements. The words 'whether such information amounts to a confession or not' clearly indicate that *'information' is not only limited to a statement by the accused but also encompasses acts or conduct of the accused which relate distinctly to the fact discovered. This would of course consist of acts like pointing out the place where an article is hidden or where the accused leads the police to the article. As was held by Gunn SCJ in Wai Chan*

Leong, 'information' included knowledge derived by the person informed by the accused as well as the means taken to impart that knowledge. (Emphasis added.)

[28] In the light of the authorities referred to, we hold that information admissible under s 27 of the Evidence Act includes accused's statement, or his act or conduct such as pointing out which leads distinctly to the discovery of a fact. For such information to be admissible in evidence, there is no duty on the prosecution to prove the voluntariness of the information. Hence it is not necessary to conduct a trial within a trial to determine the voluntariness of the information (see *Amathevelli a/p Ramasamy v Public Prosecutor* [2008] 3 MLJ 782; [2008] 4 CLJ 413 (CA) per Raus Sharif JCA (now PCA), *Francis Anthonysamy v Public Prosecutor* [2005] 3 MLJ 389 (FC), *Mohd Ya'cob bin Demyati lwn Pendakwa Raya* [2011] 2 MLJ 321; [2011] 4 CLJ 758 (CA) (affirmed by the Federal Court in Criminal Appeal No 05–122 of 2008(N) on 2 November 2010, and the application to review the aforesaid decision was also dismissed by the Federal Court on 10 February 2011. Reverting to the facts of the present case, admittedly there is no evidence to show that Siew had given any statement to PW6 when asked by PW6 where the key was. However, PW6 testified that the the bunch of eight keys was found on top of the lamp which was fixed above the door to the bathroom, and it was pointed by Siew. PW6 said that the location of the bunch of keys was such that one would not be able to see it if one was entering the bathroom. In other words, if Siew had not pointed it to PW6, the latter would not be able to retrieve the keys. Applying the authorities which we have referred to, we hold that Siew's act of pointing to the place where the bunch of keys was found amounted to information, and that information related distinctly to the discovery of a fact — the bunch of eight keys, ('the first fact') and was admissible under s 27 of the Evidence Act. The fact thereby discovered embraced the place where the bunch of eight keys was kept (on top of the lamp fixed above the door to the bathroom), and Siew's knowledge as to that (see *Chong Soon Koy v Public Prosecutor* [1977] 2 MLJ 78). The importance of the first fact could be seen from what happened next. Using one of the keys from the bunch of the keys which he had retrieved earlier on, PW6 managed to open the door to the second room. PW6 saw a safe in the room. PW6 found the safe locked with a combination lock and a key. PW6 managed to find the key to the safe. It was found at the crook of one of the legs of the dining table in the living room. The key was pointed to PW6 by Siew. We hold that Siew's act of pointing to the place where the safe key was found amounted to information, and that information related distinctly to discovery of a fact — the safe key, ('the second fact'), and was admissible under s 27 of the Evidence Act. The fact thereby discovered embraced the place where the key was kept (at the crook of one of the legs of the dining table which was in the living room), as well as Siew's knowledge as to that (see *Chong Soon Koy v Public Prosecutor*). In *Chong Soon Koy*, the accused was charged with being in possession of a firearm and ammunition under s 57(1)(a) and (b) of the

Internal Security Act 1960. He was found guilty and sentenced to death. He appealed to the Supreme Court. The prosecution adduced evidence of certain information made by the accused under s 27 of the Evidence Act 1950. In delivering the judgment of the Supreme Court, Suffian LP explained the operation of s 27 of the Evidence Act:

> What about the operation of s 27 of the Evidence Act then?
>
> The evidence is as follows: One Fong Choon Leng was arrested. Partly as a result of information given by him about the existence of a firearm and its relation to the accused. On March 19, 1976, the accused was arrested by Special Branch. On April 7, 1976, Mr Ong Thye Peng (PW3) of the CID recorded a statement from the accused. *At approximately 3.55pm while recording the statement Mr Ong was given by the accused 'information with regard to a firearm and some ammunition which he had hidden in the Berapit Hills in Bukit Mertajam'.* Mr Ong then stopped recording the statement and was with other police officers led by the accused to the foot of Berapit Hills. Mr Ong continued his evidence as follows:
>
> The whole party trekked up hilly terrain for about an hour in single file, with accused leading the way. After an hour accused stopped and pointed to a spot which was sort of cavern formed by boulders inside the cavern accused pointed to a spot where I saw a slab of thin granite of 11/2 ft diameter oval. Underneath this granite was a black plastic container … I directed the accused to carry this out of the cavern to open space outside. From this plastic container, accused took out two ammunition boxes The accused opened one of the two containers. Inside were two packages. In one package there was an automatic Liama Special (P3 identified) and two magazines (P4 A and B identified) … In (another package) were 37 rounds of. 32 ammunition (P7 and P6 identified).
>
> With reference to s 27 of the Evidence Act, which reads as follows:
>
> > When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether such information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.
>
> *What was the fact discovered? The fact discovered embraces the place from which the pistol and ammunition were produced and the knowledge of the accused as to this.*
>
> *What was the information supplied by the accused relating distinctly to the fact thereby discovered? It was 'information with regard to a firearm and some ammunition which he had hidden in the Berapit Hills in Bukit Mertajam'* in the words of Mr Ong. All that evidence is admissible, since in the words of the Privy Council at p 77 in P*ulukuri Kotayya v King Emperor* 74 IA 65, a decision on the eguivalent section of the Indian Evidence Act:
>
> > … In Their Lordships' view, *it is fallacious to treat the fact discovered within the section as equivalent to the object produced, the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this,* and the information given must relate distinctly to the fact. Information as to past user, or the part history, of the object produced is not related to its discovery in the setting

> in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A,' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.
>
> *In view of the above authority all the evidence of Mr Ong which we have reproduced is admissible and that evidence alone, apart from the cautioned statement, is enough to justify the verdict arrived at by the learned trial judge.* (Emphasis added.)

[29] In addition, it must be added that the evidence of Siew leading PW6 and the police team to the first house and pointing out the place where the bunch of eight keys was found, and later pointing out the place where the key to the safe was found would also be relevant and admissible as conduct under s 8 of the Evidence Act. In this regard in *Prakash Chand v State* AIR 1979 SC 400, the Supreme Court of India said:

> For example, the evidence of the circumstances, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapons which have been used in the commission of the offence were found hidden, would be admissible as conduct, under s 8 of the Evidence Act, irrespective of whether any information contemporaneously with or antecedent to any such conduct falls within the purview of s 27 of the Evidence Act (vide *Himachal Pradesh Administration v OM Prakash* AIR 1972 SC 975).

(See also *Durlav Namasudra v Emperor* AIR 1932 Cal 297; [1932] 26 CWN 373; [1932] 37 Cr LJ 546, *Ramakrishnan v Bombay State* AIR 1955 SC 104; [1955] Cr LJ 196, and *Gurusamy v Public Prosecutor* [1965] 1 MLJ 245, *Public Prosecutor v Hashim bin Hanafi*, *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341).

[30] Now, in *Chong Soon Koy*, the Supreme Court found that PW3's evidence set out in the passage in the judgment of the Supreme Court which we have just quoted, that included information supplied by the accused to PW3 with regard to a firearm and some ammunition which he (the accused) had hidden in the Berapit Hills as well his conduct of leading PW3 and the police party to the Berapit Hills and pointing to a spot where the firearm and ammunition were found, alone was sufficient to justify the guilty verdict on the accused, of the offence of possession of firearm and ammunitions. In *Chong Soon Koy*, from PW3's evidence, the information supplied by the accused consisted of statement as well as conduct which led to discovery of facts (a firearm and ammunition) which were the very subject matter of the charge. Admittedly in the present case, the information supplied by Siew (his acts of

pointing) did not lead directly to discovery of the proscribed drugs. However, the information supplied by Siew led distinctly to the discoveries of the first and the second facts. The evidence of the information supplied by Siew which led to the discovery of those facts standing alone may not be sufficient to establish a prima facie case against Siew. However, as will be shown later in this judgment, that evidence does not stand alone. There are other evidence which must be thrown into the scale. More of this when we deal with the cumulative effect of all the evidence against Siew.

[31] To complete the discussion on the submission on s 27 of the Evidence Act, reference must now be made to *Amathevelli v Public Prosecutor*. Learned counsel contended that the decision of the Court of Appeal in admitting the evidence of pointing as information under s 27 was contrary to the decision of the Federal Court in *Amathevelli v Public Prosecutor*. With respect we do not agree. *Amathevelli v Public Prosecutor* did not decide that conduct such as pointing out was not information under s 27. Whether pointing out amounted to information or not under s 27 was not an issue before the Federal Court. In fact in *Amathevelli v Public Prosecutor* the information relied upon by the prosecution was the following statement given by the accused to PW12:

> Encik, rantai leher emas yang saya ambil daripada perempuan … itu ada saya simpan di rumah saya di No. 130, Jalan 5, NUPW Gatco, Air Hitam. Saya boleh bawa encik dan tunjukkan di man a saya simpan rantai leher emas tersebut.

That statement which the prosecution contended led to the discovery of P40, the deceased's gold chain from the accused's house, was recorded in the document P51. The problem was that the only evidence adduced by the prosecution of that information was the record of it as contained in P51. PW12 did not give any oral evidence of that information. The Federal Court held that there must be oral evidence of the information supplied by the accused. In other words, tendering of P51 alone was not sufficient. P51 alone cannot be a substitute for the information. The police officer to whom the information was given must depose in his evidence what that information was. At the highest, P51 would serve only as evidence of corroboration of oral evidence of the information (which in that case was absent). This is clear from the judgment of Arifin Zakaria CJ (Malaya) (now CJ) at pp 121–122:

> However, that is not the end of the matter in so far as admissibility of the information supplied by the appellant is concerned. *The only evidence adduced by the prosecution of the information is the record of it as contained in P51. SP12 did not give any oral evidence of it.* In commenting on the manner of giving evidence of information received under s 27, Augustine Paul J (as he then was) said in *Public Prosecutor v Hashim bin Hanafi* at pp 185–186:
>
> > Information given under s 27 is not a matter that is required by law to be in writing so as to be governed by ss 91– 92 of the Act. Therefore the information must be proved by oral evidence pursuant to s 60(b) of the Act. Thus a written

record of the information given by the accused will not by itself be substantive evidence of its contents and it is what the witness deposes in court as having been said by the accused that will be evidence (see Bhagirath). Where the information is contained in a police diary it can only be used for the purpose of refreshing memory (see *Public Prosecutor v Er Ah Kiat* [1966] 1 MLJ 9). Where it is contained in any other document it can, at the highest, serve only as evidence of corroboration. It is on this basis that a report prepared by a chemist pertaining to his analysis of drugs cannot be tendered as substantive evidence of its contents but only as corroboration of his oral evidence in court under s 157 of the Act (see *Saw Thean Teik v R* [1953] MLJ 124; *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273). The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible (see *Deputy Public Prosecutor v Hester* [1972] 3 All ER 1056). Its role is to confirm other evidence in the sense that it renders that other evidence more probable (see *Doney v R* (1990) 171 CLR 207; *Deputy Public Prosecutor v Kilbourne* [1973] AC 729). It cannot therefore amount to that other evidence itself. Thus the record of an information will only enhance the credibility of the witness and the absence of it cannot render the oral evidence of it inadmissible; nor can it be a substitute for the evidence that it is meant to corroborate.

It is therefore clear that there must be oral evidence of the information given. P51 cannot be a substitute for it. Accordingly, we hold that P51, the information supplied under s 27 by the appellant, is inadmissible. (Emphasis added.)

FAILURE BY THE PROSECUTION TO PROVE EXCLUSIVE POSSESSION OF THE PROSCRIBED DRUGS

[32] This is a regurgitation by learned counsel of the ground he submitted in the courts below. Learned counsel capitalised on the fact that Chantana was arrested in the second house. She was remanded but was later released. Learned counsel also pointed out that some ladies' clothings were found in the first house. He therefore contended that Chantana had access to the first house in which the proscribed drugs were found. He argued that if Chantana was in the first house, she could be the culprit. He contended that the prosecution should have called her to exclude her as having access to the house and that the failure by the prosecution to do so resulted in its failure to prove exclusive possession or occupation of the first house by Siew resulting in the failure to prove exclusive possession of the proscribed drugs by Siew. We are unable to agree with the submission. The submission by learned counsel raised the issue whether Siew was in possession of the proscribed drugs at the material date and time. It has been said that the word 'possession' is one of the most difficult of the English words and that it is a vague and general word which cannot be closely defined (see *Leow Nghee Lim v R* [1956] 1 MLJ 28, per Taylor J). In *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209, this court had occasion to explain again the meaning of 'possession'. In that case

this court held that it was inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, and that one could be in possession jointly with another or others. The court also held that to say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person that a conviction is possible. Explaining this Abdul Aziz Mohamad FCJ speaking for the court said at pp 217 (MLJ):

> It is inappropriate to speak of possession of an article in criminal law as exclusive possession. *One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, — that is, 'exclusive' that a conviction is possible.* When the learned trial judge said 'The accused sought to negative the proof of exclusive possession …', *we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.*

The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] MLJ 28 p 201; [1955] 1 LNS 53:

> … It is often said that 'possession must be exclusive'. This is ambiguous. *Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.*
>
> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

Thomson J, in *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237; [1956] 1 LNS 17, said that 'possession' for the purposes of criminal law involves possession itself which some authorities term 'custody' or 'control' — and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th Ed), at p 304, in which the exclusive element mentioned by Taylor J appears:

> *A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.*

Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession. (Emphasis added.)

[33] Commenting on the judgment of the Court of Appeal in that case, His Lordship said:

Secondly, the Court of Appeal took the view 'that exclusive possession has not been proven as there is a gap in the case for the prosecution'. That view was taken in consequence of their finding that the prosecution had failed to exclude the possibility that Boy and Razali had access to the house and the respondent's room. That finding was made after noting that, on the facts and the evidence, the learned trial judge was wrong in his reasons for concluding that Boy had ceased to live at the house when the raid took place, and that the prosecution failed to call Boy and Razali as witnesses or offer them to the defence. Like the learned trial judge, the Court of Appeal also qualified possession by the word 'exclusive'. *When the Court of Appeal said that 'exclusive possession has not been proven' we take it that they meant no more than that the prosecution had failed to exclude the probability of the cannabis being placed in the respondent's bag by someone else without his knowledge and therefore of his being innocent of possession of the cannabis.*

[34] In explaining the meaning of possession, in the off-cited case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 (cited with approval by this court in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1 and in *Public Prosecutor v Denish Madhavan*) Thomson J said:

'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed), p 304):

A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. *The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.* If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also freguently used by other people then the mere fact that I am in physical proximity to it does not

A give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or *it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key* or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred B in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.

C

[35] So, in our judgment in the circumstances of this case, the presence of the ladies clothing (two female upper garments and two pairs of female jeans) along with male clothing in the third room of the first house does not mean that no possession was established against Siew. The crucial question is whether D Siew was so situated with respect to the proscribed drugs found in the second and third rooms of the first house that he had the power to deal with the drugs as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. In other words, Siew must be so situated that he can deal with the proscribed drugs as if E it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he had animus possidendi). Invariably this is a fact which can only be proved by inference from surrounding circumstances of this case. It must be clear from the circumstances in which the proscribed drugs were found, that Siew had the F intention of dealing with the drugs as if they belonged to him. The list of such possible circumstances is not exhaustive. One example of such circumstances given by Thompson J in *Chan Pean Leon* is a case where an article is found in a locked room where one holds the key. In the present case, Siew was in possession of the keys to the locked first house in which large amount of G dangerous drugs were found in two locked rooms; the keys to which were kept at the locations known to Siew. This brings us back to the circumstances and sequences established by the evidence in this case:

(a) at about 1.10am on 3 August 1997, a car arrived infront of house No 7, Jalan 3, Taman Subang. The driver was the only person in the car. It did H not stop. It proceeded to the end of the road, and about 2–3 minutes later, it turned back and stopped infront of the house. The driver — who was Siew, got out of the car. Siew was arrested by PW6 and his team who were waiting in ambush. At that time Siew was holding a black sling bag. I In that bag PW6 found a wallet, Siew's identity card and a bunch of three keys. Siew was taken to Balai Polis Kg Baru Subang. In other words Siew was found to be in possession of three keys which he carried in the sling bag together with his wallet and identity card;

(b) it was not by chance that Siew was in possession of the keys to the first

house. He was the tenant of the house. The evidence of the owner of the first house, Koh Chin (PW3) and her husband, Koh Sam Choy (PW4) established that the house was rented to Siew on 10 April 1997 with the rental of RM700. The tenancy agreement regarding the same was identified as P68. The house keys were given to Siew;

(c) back to the day of Siew's arrest, at the police station, PW6 questioned Siew. Upon conclusion of the questioning, Siew led PW6 and his team to the first house. On arrival at the first house, PW6 found the front gate to be locked with a 'Solex' padlock. Using one of the keys found in the black sling bag seized from Siew earlier, PW6, managed to unlock the padlock. PW6 and his team took Siew into the compound of the first house. PW6 saw that the grille door to the house was also locked with another 'Solex' padlock. Using the same key which was used to unlock the gate padlock, PW6 managed to unlock the grille door padlock. PW6 found the sliding front door to be closed but not locked. PW6 slid open the door and entered the house. The lights in the living room were on. Nobody was found in the house. PW6 began his search of the house. PW6 went to the first room on the left. It was not locked. He switched on the lights and found that there was no furniture in the room except for a big mattress;

(d) PW6 then went to the second room. He found it locked. According to PW6, he asked Siew where the room key was? PW6 said he found a bunch of 8 keys on the long fluorescent lamp which was fixed above the door to the bathroom. That bunch of keys was pointed to him by Siew. We have held that Siew's act of pointing to the place where the bunch of keys was kept amounted to information and that information related distinctly to the discovery of a fact — the bunch of eight keys ('the first fact'), and was admissible under s 27 of the Evidence Act. The fact thereby discovered embraced the place where the bunch of eight keys was kept, and Siew's knowledge as to that. According to PW6's evidence, the location of the bunch of keys on the fluorescent lamp was such that one would not be able to see it if one was entering the bathroom. In other words, the bunch of keys was concealed from view, but Siew knew where it was hidden. Using one of the keys from the bunch of keys which he had retrieved, PW6 managed to open the door to the second room. PW6 switched on the lights in the room. He saw a safe in the room. The safe was locked with a combination lock and a key;

(e) PW6 managed to find the key to the safe. It was found at the crook of one of the legs of the dining table which was in the living room. The key was pointed to him by Siew. We have held that Siew's act of pointing to the place where the safe key was found amounted to information, and that information related distinctly to discovery of a fact — the safe key ('the second fact'), and was admissible under s 27 of the Evidence Act. The fact thereby discovered embraced the place where the key was kept, as well as

Siew's knowledge as to that. According to PW6, unless shown the key, one would not be able to see the key at the place where it was hidden. In other words, Siew knew that the safe key was hidden there. Using the key so found, PW6 succeeded in opening the safe. According to PW6, because the combination lock had by then already been unlocked, he was able to open the safe using the key. In the safe PW6 found four blocks of substance suspected to be heroine. Apart from that PW6 also found three handguns and 52 rounds of ammunition in the safe;

(f) PW6 then proceeded to the third room. He found it to be locked. Using one of the keys in the bunch of eight keys found earlier, PW6 opened the door to the third room and switched on the lights. In the third room PW6 found a great number of items (as listed in the search list (P70) including the following:

(i) nine plastic packets in a New-Sun bag containing substance suspected to be heroin;

(ii) a box containing 12 plastic packets all of which contained substance suspected to be heroin;

(iii) an aluminium bowl containing a white powder which PW6 suspected to contain caffeine;

(iv) a green plastic container containing white powder;

(v) a sack containing white powder suspected to be caffeine;

(vi) a box with the brand name 'Hamburg Chemicals', containing three glass bottles filled with chloroform;

(vii) a box with the brand name 'Rusy', containing three glass bottles filled with hydrochloric acid;

(viii) four microwave ovens;

(ix) two food processors;

(x) two weighing scales;

(xi) a sealing machine;

(xii) 12 packets containing a total of 144 pink plastic bottles containing colouring matter; and

(xiii) two packets containing a total of 24 red plastic bottles containing colouring matter;

(g) PW7's evidence established that the four blocks found in the safe in the second room alone contained 924.6g of heroin. This is 61.64 times more than the statutory minimum weight provided under s 37(da)(i) of the DDA for the purpose of triggering the presumption of trafficking;

(h) that is not all. PW7's evidence also established that:

(i) the substance found in aluminium bowl in the third room in the first house contained 242g of heroin;

(ii) the substance in the nine plastic packets found in the third room in the first house contained 111.6g of heroin and 52.3g of monoacetylmorphine; and

(iii) the substance in the 12 plastic packets found in the third room of the first house contained 173.9g of heroin and 79.0g of monoacetylmorphine;

(i) from the first house, PW6 and his team together with Siew went to the second house. At the second house, PW6 met Siew's wife — Chantana who opened the door for them. PW6 searched the house. In a store room on the ground floor of the house PW6 found the following:

(i) eight sacks containing a white powder suspected to be caffeine;

(ii) a box containing four glass bottles filled with a liquid suspected to be chloroform; and

(iii) a box containing two glass bottles filled with a liquid suspected to be hydrochloric acid;

(j) the total amount of the dangerous drugs found in the first house as aforesaid is 1583.4g (1,452.1g of heroin and 131.3g of monoacetylmorphine). This is 105.56 times more than the statutory minimum weight provided under s 37(da)(iiia) of the DDA for the purpose of triggering the presumption of trafficking. That is a very large amount of dangerous drugs.

[36] Learned counsel submitted that in a case such as this where the prosecution was relying on circumstantial evidence, the burden of the prosecution was a heavy one and that the evidence must point irresistibly to the guilt of the accused. *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 was cited in support of that submission. Reverting to the evidence in this case, learned counsel contended that the evidence adduced by the prosecution fell short of proving of prima facie case against Siew. This is the fifth ground of appeal submitted on Siew's behalf. With respect we are unable to agree with that submission. Each of the circumstantial evidence which we have set out, taken by itself is insufficient to bring home the charge against Siew. However, it is the combined effect of the several strands of circumstantial evidence which must be considered by the court. Explaining the governing principle, in *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307, Thomson CJ said:

> In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong

A enough to sustain the convictions. That is very true. It must, however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

B

[37] The circumstantial evidence that we have dealt with, established that Siew was in possession of the keys to a locked house ('the first house') which he carried with him in his sling bag together with his wallet and identity card. He was the tenant of the first house. Upon questioning he led PW6 to the first C house. Using one of the keys found in Siew's possession, PW6 managed to unlock the padlock used to lock the gate, and another padlock locking the grille door. There was nobody in the house. The first room was not locked. No dangerous drugs was found therein. The second room was locked. PW6 found a bunch of eight keys on long fluorescent lamp which was fixed above the door D to the bathroom. The bunch of keys was pointed to PW6 by Siew. The location of the bunch of keys was such that one would not be able to see it if one was entering the bathroom. In other words, it was concealed from view, but Siew knew where it was hidden. Using one of the keys PW6 succeeded in opening the door to the second room. In that room there was a safe which was locked E with a combination number and a key. PW6 managed to find the key to the safe which was found hidden at the crook of one of the legs of the table which was in the living room. The key was pointed to PW6 by Siew. In other words, Siew knew that the safe key was hidden there. Using the key PW6 was able to open the safe. In the safe PW6 found four blocks of substance suspected to be F heroin, three hand guns and 52 rounds of ammunition. The four blocks were confirmed to contain 924.6g of heroin. The third room was also locked. Using one of the keys from the bunch found earlier, PW9 managed to open the door of that room. In that room, PW6 found an aluminum bowl containing substance which was later confirmed to contain 242g of heroin, nine plastic G packets containing substance which was confirmed to contain 111.6g of heroin and 52.3g of monoacetylmorphine, and 12 plastic packets containing substance which was later confirmed to contain 173.9g of heroin and 79g of monoacetylmorphine. In other words a very big amount of dangerous drugs was found in the first house. The question is what is the combined effect of all H the circumstantial which we have set out? Where did the totality and the total effect of all the evidence lead the court to? Did it not lead to the inevitable, and the only conclusion that Siew was found in possession of the proscribed drugs? In our judgment the answer to the above question must be in the affirmative. Siew was so situated with respect to the proscribed drugs found in the second I and the third rooms in the first house that he had the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need (*Public Prosecutor v Denish Madhavan* and *Chan Pean Leon v Public Prosecutor* applied). The learned trial judge was right when he held that the prosecution had proved

actual possession of the proscribed drugs against Siew. Having made the affirmative finding of possession, and as the amount of dangerous drugs in this case was more than 15g, the learned trial judge invoked (and in our view rightly) the presumption of trafficking under s 37(da) of the DDA. In our judgment, the learned trial judge was right in calling upon Siew to enter on this defence on the charge of trafficking against him.

ERROR ON THE PART OF THE COURT OF APPEAL IN RELYING ON THE INFORMATION RECEIVED IN CONNECTION WITH THE CASE

[38] Learned counsel submitted that the Court of Appeal should not have relied upon the information received by the police that 'seorang lelaki Cina akan pergi ke rumah itu untuk mengutip wang hasiljualan dadah'. According to the learned counsel similar error was made by the High Court. Learned counsel argued that that information was hearsay and prejudicial to Siew. In support of his submission learned counsel cited *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 and *Chan King Yu v Public Prossecutor* [2009] 1 MLJ 457. We are unable to accept that submission. In *Alcontara*, this court quashed the conviction on a charge of trafficking in cannabis. In the first place this court found that the trial judge had erred in his handling of the facts when considering the defence case, in that he had assumed contrary to the evidence that there had been a belated disclosure of the defence, and in specifically relying on this as a ground for rejecting the defence. This court found that on the contrary, the evidence indicated that given the circumstances, the accused in that case had made a prompt disclosure of his defence in his cautioned statement. The court was of the view that as a result of this misdirection by the trial judge, the case for the accused must have been seriously weakened in the eyes of the trial judge, and the chance of his attaching any degree of credence to it seriously prejudiced. On the ground of that misdirection alone, the court was of the view that the conviction could not stand, and had, therefore, to be quashed. Despite that conclusion which would have been sufficient to dispose of the appeal, the court nevertheless went on to deal with three further grounds for allowing the appeal. The court went on to consider another ground which related to the disclosure in evidence of the fact that the police operation in that case was on information received that a certain Indian man would be trafficking in and transporting drugs in a certain motorcar. Although the court opined that the disclosure of such information may well be open to the objection that it was hearsay and prejudicial to the accused, the court did not expressly state whether that disclosure was another ground for allowing the appeal. Therefore to us it seems doubtful whether the accused in that case would have been acquitted on the ground of the disclosure of that information alone. To us the crucial question is whether it can be said that the courts below had acted on the impugned information? Support for

such inquiry can be derived from the majority decision of this court in *Chan King Yu v Public Prosecutor* in which *Alcontara v Public Prosecutor* was also referred to. In that case the accused's appeal against his conviction and sentence on charge of trafficking in dangerous drugs was allowed by this court. The offence was alleged to have been committed in Room 1303 of Hotel Nova in Kuala Lumpur on 19 June 2000. The prosecution's evidence included the information received by the police in the morning of 19 June 2000 that a Chinese male from Hong Kong by the name of Chan King Yu would be trafficking in dangerous drugs at Hotel Nova in Kuala Lumpur. The police was also provided with a photograph of Chan King Yu to identify him. In the Federal Court one of the grounds argued on behalf of the accused was that the trial judge and the judges of the Court of Appeal had misdirected themselves in admitting hearsay and prejudicial evidence relating to the police acting on the information received by them as aforesaid. After setting out the evidence of the information received as related by the material prosecution witnesses, and upon considering the judgments of the learned trial judge and the Court of Appeal respectively on the impunged information, Zulkefli FCJ (now CJ (Malaya) in one of the majority judgment said:

> I am of the view from the above *quoted findings* in the judgment of the courts *it can be said that both the High Court and the Court of Appeal had acted on statements which were clearly hearsay and prejudicial* to the appellant and therefore inadmissible. (Emphasis added.)

[39] Reverting to the instant appeal, unlike in *Chan King Yu v Public Prosecutor*, we find nothing in the judgment of the learned trial judge to show that she had acted on the impugned information in arriving at her decision to find Siew guilty of the trafficking charge. Similarly, there is nothing in the judgment of the Court of Appeal to show that it had acted on the impugned information in upholding the decision of the High Court. Going back to *Chan King Yu v Public Prosecutor* it must be added that in that case this court found that there were other more important grounds for allowing the accused's appeal which included the following:

(a) the failure of the police to investigate the role of Man Chai although the name was mentioned in the accused's cautioned statement. The accused claimed that the incriminating exhibits belonged to Man Chai and the court found that Man Chai was not a fictitious character;

(b) there was justification to find that the police raiding party had actually entered the accused's hotel room earlier in the absence of the accused, before entering the room the second time when the accused was in the room; and

(c) in connection with the aforesaid ground, the court ruled that the failure of the prosecution to call a material witness, one DSP to give evidence,

justified the invocation of the adverse inference under s 114(g) of the Evidence Act. In this regard, in relation to the existence of two raids conducted by the police team on Room 1303 as contended by the defence, the court was of the view that the defence had validly raised the issue of the intentional concealment by the prosecution as to the identity and involvement of the DSP in the raid. Three police officers (PW3, PW5 and PW7) in their evidence repeatedly denied the presence of the DSP and his involvement in the raid at the said hotel. The court found that their evidence on the issue of the presence of the DSP was directly in contrast with the evidence given by the employees of the hotel (DW2 and DW3) who were called by the defence. The court was of the view that the accused's contention that the DSP was at the scene or even earlier was tenable. The DSP was there at the scene until the raid was carried out. The failure to call him to give evidence therefore triggered the adverse inference under s 114(g).

[40] Thus, just as in the case of *Alcontara v Public Prosecutor*, it seems to us doubtful whether in *Chan King Yu v Public Prosecutor* the accused's appeal would have been allowed solely on the ground that the courts below had acted on the evidence of the impugned information.

FAILURE BY THE COURTS BELOW TO INVOKE THE ADVERSE INFERENCE UNDER S 114(g) OF THE EVIDENCE ACT 1950

[41] The complaint here is the failure of the prosecution to call Chantana. In submitting on the failure to invoke the adverse inference under s 114(g) of the Evidence Act on account of the prosecution's failure to call Chantana, learned counsel actually repeated in substance his submissions in the courts below. We are unable to accept the submission of learned counsel. Firstly, we need to reiterate that adverse inference under s 114(g) of the Evidence Act can only be drawn if there has been withholding or suppression of evidence and not merely on account of failure to obtain evidence (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494 (SC), *Mohd Shamshir bin Md Rashid v Public Prosecutor* [2008] 5 MLJ 80; [2008] 5 AMR 29 (CA)). In the instant appeal we find no such withholding or suppression of evidence. In its judgment the Court of Appeal said:

Dalam kes sekarang ini hakim perbicaraan berpuas hati bahawa pihak pendakwa telah pun berusaha untuk mengemukakan isteri perayu itu sebagai saksi tetapi telah gagal mengesan beliau, dan oleh itu, beliau memutuskan bahawa keterangan saksi itu bukanlah 'keterangan yang boleh dikemukakan tetapi tidak dikemukakan' dalam pengertian s 114(g) tersebut. Kami bersetuju. Tiada keterangan dikemukakan bahawa pihak pendakwa telah dengan sengaja menyekat

> pengemukaan Chantana sebagai saksi. Sebaliknya, keterangan SP10 jelas menunjukkan segala usaha yang munasabah telah diambil untuk mengesannya tetapi gagal.

We agree. In fact in the retrial, the prosecution had sought to introduce, under s 33 of the Evidence Act, Chantanas' evidence given in the earlier trial but was rejected by the learned trial judge because she held that the prosecution's efforts through the evidence of SP10 in particular, fell short of the preconditions under s 33 of the Evidence Act. However, she was satisfied that the prosecution did make an effort to bring her to court, but failed to do so. This is what she said:

> I was also urged by the defence to invoke the presumption in paragraph 114(g) of the Evidence Act 1950 as Chantana was not brought to court by the prosecution to give evidence. Earlier I had rejected the prosecution's application to introduce, under section 33 of the Evidence Act, Chantana's evidence given during the earlier trial. I did not invoke the presumption as it was quite clear that while the prosecution's effort, through SP10 in particular, fell short of the preconditions prescribed in section 33 of the Evidence Act, the prosecution did make an effort to bring her to court, but failed to do so. Her evidence was not therefore 'evidence which could be and is not produced' within the meaning of paragraph 114(g) of the Evidence Act.

We find no reason to disagree with her.

[42] In connection with his submission on the adverse inference under s 114(g) of the Evidence Act, learned counsel also contended that the prosecution should have called Chantana to exclude her as having access to the first house, and that the failure by the prosecution to do so resulted in its failure to prove exclusive possession or occupation of the first house by Siew resulting in the failure to prove exclusive possession of the proscribed drugs by Siew. As would be recalled, this point was also raised by learned counsel when he submitted on the failure by the prosecution to prove exclusive possession of the proscribed drugs. We have dealt with this point. We have said that we were unable to agree with the submission and we have set out the reasons for the same at length. Anyway, in the context of s 114(g) of the Evidence Act, learned counsel's submission brought into focus the issue of the prosecutorial discretion in the calling of witnesses in a criminal prosecution. It is well settled that in a criminal case, the prosecution, provided that there is no wrong motive, has a discretion as to what witnesses should be called by it (see *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105 (CA), *Adel Muhamed El Dabah v Attoney General of Palestine* [1944] AC 168, *Public Prosecutor v Datuk Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1). However, that prosecutorial discretion must be subject to the most basic limitation that it has to produce all the necessary evidence to prove the case against the accused beyond reasonable doubt (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 at p 19, (SC)). Thus, in

Teoh Hoe Chye v PP Yeap Teong Tean v PP [1987] 1 MLJ 220, Abdul Hamid CJ (Malaya) (as he then was) said at p 229:

> Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (*Abdullah Zawawi v Public Prosecutor*). Insofar as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi*'s case).

[43] In other words, in the end it is the sufficiency of the evidence that matters. In the present appeal, we find no such unsatisfactory features or gap in the prosecution's case. Indeed, as is clear in this judgment and for reasons which we have explained we are satisfied that the learned trial judge was right in holding that a prima facie case of trafficking in dangerous drugs had been made out against Siew.

NO OBLIGATION ON SIEW TO DISCLOSE HIS DEFENCE

[44] In respect of this ground, learned counsel contended that the Court of Appeal erred in not holding that there was no obligation on Siew to disclose his defence during the prosecution's case as he had a legal right to remain silent. *Alcontara v Public Prosecutor* was cited in support of that submission. We find no merit in the submission. In his defence, Siew elected to and gave a statement from the dock, and D171 was tendered as his statement. Siew was entirely within his legal right to do so. Nevertheless in a case which would have depended on credibility, Siew did so at his own peril. Explaining this in *Udayar Alagan & Ors v Public Prosecutor* [1962] 1 MLJ 39, Thompson CJ speaking for the Court of Appeal said:

> There was evidence which made out that charge, if it was believed. There was evidence by the appellants to the contrary, though here it must be observed that two of them took the dangerous course of making a statement from the dock instead of going into the witness-box and giving evidence. *An accused person is, of course, entirely within his legal rights when he elects to take that course, but in a case which must in the event depend on credibility he takes it at his own peril.* The rule was stated in *Shimmin*'s case 15 Cox CC 122 124 in 1882 by Mr Justice Cave in a passage which, so far as I am aware (and I am quite prepared to be told I am wrong), has never been criticised:
>
> > A prisoner, though defended by counsel, may, if he chooses, himself make his statement to the jury. He ought to be heard in his defence, and have the opportunity of making his explanation of the circumstances proved against him. *True, his statement was not made on oath, and that he was not liable to be cross-examined by the prosecuting counsel, and what he said was therefore not entitled to the same weight as sworn testimony.*

[45] On the part of the learned trial judge although Siew's statement from the dock was not evidence given under oath, she evaluated the statement as if it were given as evidence under oath (see para 81 of her judgment). We have set out Siew's statement. Siew admitted that he rented the first house, but claimed that it was for his friend, Wah Chai. Siew said he had never stayed in the first house. He said he and his wife stayed in the second house. They went to the first house only when Wah Chai was there. Siew denied knowledge of the proscribed drugs and said all the things in first house belonged to Wah Chai. However, Siew admitted that he knew the combination number of the safe. Now, Wah Chai was the central figure and the most important character whose purported existence and role served as the supporting pillar of Siew's defence. Yet, the existence and role of Wah Chai were never put during the prosecution's case. Wah Chai surfaced suddenly at the defence stage. Regarding this the learned trial judge said:

> I am aware that there is no onus on the defence to call any witness and thus no adverse inference can be drawn against the Accused for the failure to call Wah Chai as witness in his behalf. However, the fact remains that the existence of Wah Chai was never even suggested during the case for the prosecution.
>
> In view of the fact that this was a retrial and ten years had gone by since the date of his arrest, one would have thought that if Wah Chai existed, his name and his existence would have been uppermost in the mind of the Accused and would have been raised when SP9, or even SP10 and SP6, were cross-examined.
>
> The fact that 'Wah Chai' was only mentioned at the defence stage raised serious doubts as to the existence of that character.

We do not think the learned trial judge could be faulted for that. In *Alcontara v Public Prosecutor*, the Federal Court said:

> In a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, *and thus avoid the adverse comment, that the defence is a recent invention in other words, 'kept up its sleeve', as it were — and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence.* However, failure on the part of the defence to put its case as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

[46] Although failure on the part of the defence to put its case to the material prosecution's witness, can never by itself relieve the prosecution of its duty to prove the charge against the accused beyond reasonable doubt (*Alcontara v Public Prosecutor*), such failure by the defence did have serious implication on the accused's credibility and the weight to be attached to his evidence. The necessity of putting the essence of his case to the material prosecution's witness is not a mere technical rule of evidence. It is a rule of essential justice. In *Public*

Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 at pp 193–194 Augustine Paul J (as he then was) said:

> The nature of the defence is to be ascertained not only from the evidence of the accused himself but also from the trend of the cross-examination of the prosecution witnesses and from the arguments of the accused's counsel at the close of the trial (see *Kuli E Ors v Emperor* AIR 1930 Call 442). *It is therefore important for the accused to put his essential and material case to the prosecution witnesses in cross-examination. This is a principle of essential justice and was neatly stated by* Mukhrji J in *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 *in the following terms:*
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> > *The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that is merely a technical rule of evidence. It is a rule of essential justice.* It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. *It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subseguent testimony has no chance of being tested and corroborated.*

[47] In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at p 213, the Federal Court said:

> A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact they found the ammunition in the appellant's trouser pockets remains unshaken. *On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in judgment of the Supreme Court of New Zealand in Transport Ministry v Garry* where Haslam J said at p 122:
>
> > In *Phipson on Evidence* (11th Ed), para 1544 the learned authors suggest examples by way exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, viz where.
> >
> > … The story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy … or when counsel indicates that he is merely abstaining for convenience, eg to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

[48] Although the existence of 'Wan Chai' and his alleged role was never put or raised during the prosecution's case, the learned trial judge did consider Siew's defence as narrated in his statement. In evaluating the defence, she questioned why Siew was in possession of the keys to the first house and his knowledge of the place where the key to the first room and the third room was hidden, if it was true as claimed by Siew that he went to the first house only when Wah Chai was there. If it was true as claimed by Siew that the safe was used by Wah Chai to keep his personal things, the learned trial judge questioned what was the necessity for Wah Chai to disclose to Siew not only the combination number of the safe but also the place where the safe key was hidden, bearing in mind the nature of the things kept in the safe. After all according to Siew's statement, Wah Chai was secretive about what he kept in the safe in the second room and the things kept in the third room even to Siew (Wah Chai's close friend) because according to Siew he did not know or suspect that there were drugs in the house. These were matters which were properly taken into account by the learned trial judge in considering Siew's defence and evaluating its inherent probability. We are also of the view that the learned trial judge did not err in taking into account the evidence regarding the finding by the police in the second house of eight sacks of caffeine and bottles of hydrochloric acid and chloroform, similar to those found in the first house. As rightly concluded by the Court of Appeal, that evidence was taken into account for the purpose of evaluating Siew's claim that he had no knowledge of the activities in the first house or the things found there. This is clear from para 97 of the judgment of the learned trial judge:

> If the accused did not know of the activities being carried on at the first house and the substances found by the police in the first house, why were there in the second house, where the accused lived with his wife, eight sacks of caffeine and bottles of hydrochloric acid and chloroform, similar to those found in the first house?

[49] Having carefully scrutinised the evidence on record and having carefully examined the judgment of the learned trial judge and the judgment of the Court of Appeal, we are entirely satisfied that Siew's conviction is safe. In the result, Siew's appeal is dismissed. The conviction and sentence on him are affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Afiq Mohamad Noor